Federalism Not as Limits, But as Empowerment

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I. INTRODUCTION

For much of American history, and especially in recent years, federalism has been discussed primarily in terms of limiting federal power so as to protect state sovereignty. For example, during the first third of this century, dual federalism was entirely about restricting the authority of Congress by narrowly defining its powers under Article I and by reserving a zone of activities to the states.[1] Under the Burger Court, federalism was used to restrict federal court authority, such as the invocation of "Our Federalism" in *Younger v. Harris*,[2] which held that federal courts must abstain from decisions that would interfere with on-going state court proceedings.[3] Most recently, in the 1990s, in cases such as *New York v. United States*,[4] *United States v. Lopez*,[5] and *Seminole Tribe v. Florida*,[6] the Court has invoked federalism to protect states from federal laws and federal courts.

In this Paper, I want to suggest that this conception of federalism is deeply flawed. It confuses the part with the whole and it confuses the means with the end. It confuses the part with the whole because federalism is about the appropriate allocation of power between the federal and state governments. An aspect of this is protecting states; but an equally—in fact, more—important aspect is protecting authority of the

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1. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (invalidating federal laws as exceeding the scope of Congress's Commerce Clause authority or as violating the Tenth Amendment).

2. 401 U.S. 37 (1971).

3. *See id.* at 54. *See also* Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981) (using federalism as a basis for precluding federal court review of the constitutionality of state taxes); Rizzo v. Goode, 423 U.S. 362 (1976) (using federalism as a basis for precluding federal court review of systematic police abuse).

4. 505 U.S. 144 (1992) (declaring unconstitutional a federal law as violating the Tenth Amendment because it coerced state legislative and regulatory activity).

5. 115 S. Ct. 1624 (1995) (declaring unconstitutional the federal Gun Free School Zones Act as exceeding the scope of Congress's commerce clause authority).

6. 116 S. Ct. 1114 (1996) (holding that Congress may not override the Eleventh Amendment except if acting under section 5 of the Fourteenth Amendment and that state officers may not be sued pursuant to federal laws that contain a comprehensive enforcement mechanism).

federal government. This has been omitted from contemporary Supreme Court opinions considering federalism.

Moreover, focusing on protecting states treats the structure of government as if it is an end in itself. But the structure of government is a means to the end of effective government that minimizes the possibility of tyrannical rule. One of the classic arguments for protecting state sovereignty is that dividing power among multiple levels of government decreases the likelihood of abusive government.[7] But that claim depends on unsupported assumptions about which levels of government are most likely to act in a tyrannical fashion and it ignores consideration of what structure of government is most likely to be effective in dealing with social problems.

The key challenge for the twenty-first century is government dealing with the enormous problems facing American society. In this regard, federalism can make a crucial difference. The value of having multiple levels of government is having many institutions capable of acting to solve social problems. From this perspective, federalism should be viewed as not being about limits on any level of government, but empowering each to act to solve difficult social issues.[8]

In this Paper, I want to make three major points. First, throughout American history, and especially now, federalism is viewed as being about limiting federal power to protect state governments. Second, federalism should be seen as being about the proper allocation of power between the federal and state governments. In light of this, ensuring the supremacy of federal law must be seen as central to federalism. Third, in determining the proper allocation of power between the national and state governments, the goal must be effective government. In this way, federalism should be seen as empowering each level of government to deal with society's social problems.[9]

This Paper rests on the premise that constitutional doctrines concerning federalism should be based on functional concerns.[10] The text of the Constitution is largely silent about the allocation of power between the

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7. *See* Andrzej Rapacynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 380. Professor Rapacynski noted that "[p]erhaps the most frequently mentioned function of the federal system is the one it shares to a large extent with the separation of powers, namely, the protection of the citizen against governmental oppression—the 'tyranny' that the Framers were so concerned about." *Id.*

8. For an argument that this conception of federalism is in accord with the design of the Constitution and is historically supported, see Deborah J. Merritt, *Federalism as Empowerment*, 47 U. FLA. L. REV. 541 (1995)

9. I initially suggested the idea of federalism as empowerment in Erwin Chemerinsky, *The Values of Federalism*, 47 U. FLA. L. REV. 499 (1995). This Paper develops that suggestion.

10. For an excellent development of this view, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

federal and state governments. Article I protects federalism in its initial words that Congress has the powers "herein granted."[11] As reinforced by the Tenth Amendment, this means that Congress can act only if there is constitutional authority, while states can act unless there is a constitutional prohibition. Indeed, literally, this is all the Tenth Amendment says in its declaration that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."[12] Article VI contains perhaps the most significant provision about federalism in its statement that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.[13]

But beyond these few important clauses, the Constitution says virtually nothing about federalism.[14] Nor is there any clear indication of what the framers intended, even assuming that framers' intent should be controlling in constitutional law.[15] Thus, issues of federalism, like most important constitutional questions, cannot be resolved at the level of text, intent, or history. Constitutional issues concerning federalism must be resolved at the functional level by deciding what allocation of power is best in achieving the goals of the Constitution. From this perspective, as I argue in this Paper, federalism should be considered as a way of empowering multiple levels of government to deal with social problems and not, as it traditionally has been used, as limits on government power.

II. THE TRADITIONAL CONCEPTION OF FEDERALISM: AS A LIMIT ON FEDERAL LEGISLATIVE AND JUDICIAL POWER

No area of constitutional law has changed more dramatically in the 1990s than federalism. In *New York v. United States*,[16] for only the second time since 1937—and the earlier decision had been expressly

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11. U.S. CONST. art. I, § 1.

12. U.S. CONST. amend. X.

13. U.S. CONST. art. VI, cl. 2.

14. There are a few other provisions that implicate federalism, such as Article I, § 10, which limits state governments, such as by prohibiting ex post facto laws, bills of attainder, or impairment of contracts. Also, Article V says that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V.

15. For an excellent discussion of the textual and historical basis for federalism, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

16. 505 U.S. 144 (1992).

overruled[17]—the Supreme Court declared a federal law unconstitutional as violating the Tenth Amendment. In *United States v. Lopez*, for the first time since 1937, the Supreme Court declared a federal law unconstitutional as exceeding the scope of Congress's Commerce Clause authority.[18] These decisions have spawned dozens and dozens of challenges to the constitutionality of federal laws on the basis of federalism.[19] Additionally, in 1996, in *Seminole Tribe v. Florida*,[20] the Court held that the Eleventh Amendment precludes suits against state officers to enforce federal laws that contain comprehensive enforcement mechanisms or against states pursuant to federal laws except for those adopted under section five of the Fourteenth Amendment.[21]

What these cases from the 1990s share in common is that each has used federalism as a limit on *federal* power. In *New York v. United States*, the Court declared unconstitutional the federal Low-Level Radioactive Waste Disposal Act because it required that states clean up

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17. *See* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

18. *See* 115 S. Ct. 1624, 1634 (1995).

19. In the year after *Lopez*, a number of federal statutes were challenged in the lower federal courts based on it. Most of these challenges were unsuccessful. *See, e.g.*, United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) (upholding 18 U.S.C. § 2119 (1994), carjacking); United States v. Wilks, 58 F.3d 1518 (10th Cir. 1995) (upholding 18 U.S.C. § 922(o) (1994), possession of a machine gun); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) (upholding 18 U.S.C. § 248 (1994), freedom of access to clinic entrances); United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995) (upholding 18 U.S.C. § 922(g)(1) (1994), possession of a firearm by a convicted felon).

However, a few challenges based on *Lopez* have been successful. *See* United States v. Denalli, 73 F.3d 328 (11th Cir. 1996) (declaring unconstitutional the application of 18 U.S.C. § 844(i) (1994) to arson committed on a private residence); United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (declaring unconstitutional the application of 18 U.S.C. § 844(i) (1994), prohibiting arson on a building used in interstate commerce and providing for greater penalties than those imposed under 18 U.S.C. § 844(h) (1994) for the use of fire in committing other felonies); *but see* United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995); United States v. Martin, 63 F.3d 1422 (7th Cir. 1995) (upholding the application of 18 U.S.C. § 844(i) (1994)). *See also* United States v. Schroeder, 894 F. Supp. 360 (D. Ariz. 1995) (declaring unconstitutional 18 U.S.C. § 228 (1994), failure to pay child support); United States v. Mussari, 894 F. Supp. 1360 (D. Ariz. 1995) (declaring unconstitutional 18 U.S.C. § 228 (1994), failure to pay child support); *but see* United States v. Murphy, 893 F. Supp. 614 (D. Va. 1995) (holding 18 U.S.C. § 228 (1994), failure to pay child support, to be constitutional under the Commerce Clause); United States v. Hampshire, 892 F. Supp. 1327 (D. Kan. 1995) (upholding 18 U.S.C. § 228 (1994) under the Commerce Clause).

In 1996, the Supreme Court granted certiorari on the question of whether the 1993 Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(a), which requires that local law enforcement personnel make reasonable efforts to determine whether gun purchasers are disqualified from doing so, exceeds the scope of Congress's commerce power or violates the Tenth Amendment. Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *cert. granted sub nom.*, Printz v. United States, 116 S.Ct. 2521 (1996).

20. 116 S. Ct. 1114 (1996).

21. *See id.* at 1118-19.

nuclear wastes within their borders.[22] The Court found that compelling such state legislative or regulatory activity violated the Tenth Amendment and exceeded the scope of Congress's power under Article I of the Constitution.[23] In *Lopez*, the Court declared unconstitutional the Gun Free School Zones Act, which banned firearms within 1,000 feet of a school, on the grounds that it exceeded the scope of Congress's Commerce Clause authority.[24] In *Seminole Tribe*, the Court declared unconstitutional the federal Indian Gaming Act that authorized suits against states to enforce its provisions.[25]

In other words, federalism in the Supreme Court in the 1990s has been about declaring federal laws unconstitutional based on a perceived need to protect state governments. Although this judicial activism has been unprecedented since 1937, it is in accord with the consistent concern about federalism in the twentieth century—the extent to which state sovereignty is a limit on federal power.

From 1937 until the 1990s, the Court rejected federalism as a limit on Congress's power, but embraced it as a constraint on the federal judicial power.[26] During this time period, no law was deemed unconstitutional as exceeding the scope of Congress's Commerce Clause authority and only one case, *National League of Cities v. Usery*,[27] found a federal law violated the Tenth Amendment. *National League of Cities*, however, was expressly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*.[28]

During this same period that the Court was rejecting limits on federal legislative power, the Court expressly used federalism as a basis for restricting the federal judicial power. In *Erie Railroad Co. v. Tompkins*,[29] in 1938, the Court held that the use of federal common law in diversity cases was an unconstitutional usurpation of state powers.[30] Almost simultaneous with the Court's rejection of the Tenth Amendment as a limit on Congress, the Court relied on it to explain that the federal common law had "invaded rights which . . . are reserved by the Constitution to the several states."[31]

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22. *See* 505 U.S. 144, 145-47 (1992).

23. *See id.*

24. *See* 115 S. Ct. at 1625.

25. *See* 116 S. Ct. at 1117-18.

26. In an earlier article, I discuss this seeming paradox in the Court's treatment of federalism as a limit on federal judicial power, but not federal legislative power. Chemerinsky, *supra* note 9, at 505-508.

27. 426 U.S. 833 (1976).

28. 469 U.S. 528 (1985).

29. 304 U.S. 64 (1938).

30. *See id.* at 78-80.

31. *Id.* at 80.

Indeed, in numerous decisions over the past thirty years, the Court has used federalism to limit federal judicial power. For example, the Court has ruled that the Eleventh Amendment broadly bars suits against state governments in federal courts.[32] Similarly, the Court has invoked concerns about state sovereignty and autonomy as justifications for restricting the scope of federal habeas corpus review.[33] In *Younger v. Harris*,[34] the Court proclaimed that "Our Federalism," and its assumption of comity between federal and state courts, prevented federal courts from interfering with pending state court proceedings.[35] Indeed, in *Rizzo v. Goode*,[36] the Supreme Court held that considerations of federalism limited the ability of federal courts to hear allegations of abusive practices by a local police department.[37]

Before 1937, federalism was aggressively used by the Supreme Court as a limit on Congress's powers. Between the late nineteenth century and 1937, the Court espoused a philosophy often termed "dual federalism." Dual federalism was the view that the federal and state governments were separate sovereigns, that each had separate zones of authority, and that it was the judicial role to protect the states by interpreting and enforcing the Constitution to protect the zone of activities reserved to the states.

Dual federalism was embodied in three important doctrines that the Court developed and followed during this time period. First, the Court narrowly defined the meaning of commerce so as to leave a zone of power to the states. Specifically, the Court held that commerce was one stage of business, distinct from earlier phases such as mining, manufacturing, or production. Under this view, only commerce itself could be regulated by Congress; the others were left for state regulation. For example, in *United States v. E.C. Knight Company*,[38] towards the beginning of this era, the Court held that the Sherman Antitrust Act could not be used to stop a monopoly in the sugar refining industry because the Constitution did not allow Congress to regulate manufacturing.[39] In *Carter v. Carter Coal Co.*,[40] towards the end of the era, the Court declared unconstitutional the Bituminous Coal Conservation Act of 1935,

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32. *See, e.g.*, Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987); Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984).

33. *See, e.g.*, McCleskey v. Zant, 499 U.S. 466 (1991); Teague v. Lane, 489 U.S. 288 (1989).

34. 401 U.S. 37 (1971).

35. *Id.* at 44.

36. 423 U.S. 362 (1976).

37. *See id.* at 363-64.

38. 156 U.S. 1 (1895).

39. *See id.* at 1.

40. 298 U.S. 238 (1936).

because it regulated production of coal which was seen as distinct from production.[41]

Second, the Court restrictively defined "among the states" as allowing Congress to regulate only when there was a substantial effect on interstate commerce. In all other areas, regulation again was left to the states. For instance, in *A.L.A. Schechter Poultry Corp. v. United States*,[42] often referred to as the "sick chicken" case, the Court declared a federal law unconstitutional based on an insufficient effect on interstate commerce.[43] The Court said that the federal government has the authority to regulate when there are direct effects on commerce, "[b]ut where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."[44]

Finally, the Court held that the Tenth Amendment reserved a zone of activities to the states and that even federal laws within the scope of the Commerce Clause were unconstitutional if they invaded that zone. For example, the Court held that regulation of production was left to the states and therefore a federal law that prohibited shipment in interstate commerce of goods made by child labor was unconstitutional, even though it was limited to interstate commerce, because it violated the Tenth Amendment.[45]

The point of this brief review of twentieth-century constitutional law is to show that federalism has been considered almost entirely as a limit on federal powers. In every era of this century, the Court's focus has been on the extent to which states' rights constrain federal legislative or judicial authority. And most of all, that has been the use of federalism in the 1990s, as the Court has used federalism more aggressively than at any time in the last sixty years as a basis for invalidating federal laws.

III. FEDERALISM SHOULD BE SEEN AS BEING ABOUT THE PROPER ALLOCATION OF POWER BETWEEN THE FEDERAL AND STATE GOVERNMENTS

Although virtually every aspect of federalism doctrines is controversial, it should be widely accepted that ultimately what federalism is about is the proper allocation of power between the national and state governments. In other words, federalism is both descriptive and normative. Descriptively, federalism is about how power is allocated between the

41. *See id.* at 238-42.
42. 295 U.S. 495 (1935).
43. *See id.* at 295-99.
44. *Id.* at 546.
45. *See* Hammer v. Dagenhart, 247 U.S. 251, 276 (1918).

federal and state governments. Normatively, federalism is about what that allocation should be.

This simple idea has important consequences for the debate over federalism because it helps to explain why it is misguided to focus on federalism as being solely or primarily about protecting state sovereignty. Federalism must be about protecting the interests of both the federal and the state governments. Indeed, from this perspective, the single most important provision in the Constitution concerning federalism is Article VI, which expressly declares that federal law is supreme.[46] It is the constitutional provision that most directly speaks to the relationship of federal and state law and thus between federal and state governments. Yet it is striking that throughout this symposium there has been scarcely a mention of the Supremacy Clause.

Put another way, focusing on federalism almost entirely as constraints on federal power commits a basic logical fallacy of confusing the part with the whole. The total concern must be about upholding the powers and prerogatives of both federal and state governments. Safeguarding the states is a part, but not the entirety of the appropriate focus in federalism decisions.

There are several implications from this premise. First, focusing on the supremacy of federal law as a key aspect of federalism helps to explain why the Court's Eleventh Amendment decisions are misguided. In considering the Eleventh Amendment, I will assume that its text is unclear, even though it seems clearly focused on limiting suits against states that are based solely on diversity jurisdiction.[47] I also will assume that the intent behind the Eleventh Amendment is unclear, even though very persuasive arguments have been made that the provision was meant solely to preclude diversity suits against state governments.[48] In other words, I am assuming that the meaning of the Eleventh Amendment must

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46. *See* U.S. CONST. art. VI, cl. 2.

47. The text of the Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Four Justices of the Supreme Court, but never a majority, have taken the position that the Eleventh Amendment only prevents diversity-based suits against states in federal court, but not litigation based on federal question jurisdiction. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 258-59 (1985) (Brennan, J., dissenting). *See also* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989) (textual argument that the Eleventh Amendment precludes a state from being sued by citizens of other states).

48. *See, e.g.*, William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

be decided by weighing the competing constitutional values. On the one side there is the value of protecting state governments by according them immunity from suit. On the other side there is the value of ensuring the supremacy of federal law by providing for its enforcement in federal court. Eleventh Amendment doctrines ultimately are about how to balance the desire for state immunity as against the desire for state accountability.

The Supreme Court has clearly chosen the former, seeing state sovereign immunity as constitutionally protected. The Court has declared that the Eleventh Amendment "affirm[s] that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."[49] The view is that the Eleventh Amendment reflects a "broad constitutional principle of sovereign immunity."[50]

At the very least, the Supreme Court's Eleventh Amendment decisions can be criticized for failing to explain why state immunity is more important than state accountability. The choice cannot be made based on the text or the intent of the Eleventh Amendment's framers; so it must be founded on a careful weighing of the competing constitutional considerations. Yet, there is no acknowledgement of this in the Court's many Eleventh Amendment decisions.

Furthermore, I believe that the Court's rulings give insufficient weight to ensuring the supremacy of federal law as a crucial constitutional value. Consider the Court's most recent Eleventh Amendment decision: *Seminole Tribe v. Florida*.[51] The Supreme Court declared unconstitutional a provision of the federal Indian Gaming Act that allowed states to be sued in federal court to enforce its requirement that states negotiate in good faith with Indian tribes to allow gambling on Indian reservations. In a 5-4 decision, the Court held that Congress cannot override the Eleventh Amendment, except when acting under section five of the Fourteenth Amendment. The Court thus expressly overruled a decision from just seven years earlier, *Pennsylvania v. Union Gas Co.*,[52] which held that states may be sued in federal court pursuant to federal statutes that expressly authorize such suits.[53]

The Court also ruled that state officers could not be sued in federal court to enforce the law because it had comprehensive enforcement mechanisms. Traditionally, suits against state officers have been a key way of enforcing the Eleventh Amendment and ensuring state compliance

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49. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984).

50. Pennsylvania v. Union Gas Co., 491 U.S. 1, 39 (1989) (Scalia, J., concurring in part and dissenting in part).

51. 116 S. Ct. 1114 (1996).

52. 491 U.S. 1 (1989).

53. *See id.* at 1123.

with federal law. Ever since *Ex parte Young*,[54] it has been the law that state officers may be sued in federal court, even though the state government was immune from suit. Suits against state officers have been indispensable in holding state governments accountable and providing for the supremacy of federal law. Indeed, Professor Charles Alan Wright observed that "the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law."[55] *Seminole Tribe*, though, carves an unprecedented exception to *Ex parte Young*: state officers cannot be sued in federal court to enforce federal laws that have comprehensive enforcement mechanisms. Chief Justice Rehnquist's opinion provides no definition of what would constitute such a mechanism.[56]

The key question after *Seminole Tribe* is how can the federal Indian Gaming Act, or other similar laws, be enforced. There is no doubt that Congress had the constitutional authority to enact the law pursuant to its Article I power to regulate commerce with Indian tribes. If Congress can legislate, surely it must also have the power to ensure the enforcement of its statutes. Yet, after *Seminole Tribe*, enforcement of this law seems an impossibility. The Supreme Court expressly held that neither the state government nor the state officers can be sued to enforce the statute. Chief Justice Rehnquist's opinion for the Court said that suits against state officials were barred because of the comprehensive enforcement mechanisms in the law. But the only real enforcement mechanism was the ability to sue state governments to accomplish compliance, the very provision declared unconstitutional in the first part of the opinion.

Nor is this federal statute unique. If suits against both the state and the state officer are precluded, there will be no way for the federal courts to ensure state compliance with federal law. The constitutional value of federal supremacy is sacrificed to the value of state immunity.

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54. 209 U.S. 123 (1908).

55. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 292 (4th ed. 1983).

56. One approach here would be for the Court to use a doctrine that it developed in the context of section 1983 litigation. The Court has held that suits may be brought under § 1983 to enforce federal laws, *see* Maine v. Thiboutot, 448 U.S. 1 (1980), but has created an exception for statutes that explicitly or implicitly preclude section 1983 litigation. In *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court found that the "comprehensive enforcement mechanisms" in statutes demonstrated "congressional intent to preclude the remedy of suits under § 1983." *Id.* at 20. In *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987), the Court clarified this and emphasized that preclusion of section 1983 suits required that there be "express provision or other specific evidence from the statute that Congress intended to foreclose [section 1983 litigation.]" *Id.* at 423. The Court could import this analysis into the Eleventh Amendment context in deciding what is a comprehensive enforcement mechanism for purposes of precluding a suit against state officers under *Seminole Tribe*.

The response might be that the appropriate way to secure state compliance would be suits against states in state court. The Eleventh Amendment, of course, only bars suits against states in federal court. Even assuming that there was not a state law sovereign immunity defense in state courts, this seems inadequate to ensure the supremacy of federal law. Long ago, James Madison stated: "Confidence cannot be put in State Tribunals as guardians of the National authority and interests."[57] The framers created authority for a federal judiciary because of a belief that federal courts were essential to enforce federal law. Although there is a voluminous literature debating whether state courts are equal to federal courts in their willingness to uphold and enforce federal law,[58] the federal government should be able to rely on federal courts to enforce federal laws. If Congress can legislate, Congress should be able to ensure enforcement of its law by having a federal judicial forum available. Yet, *Seminole Tribe*, and the Court's other Eleventh Amendment cases, will often preclude this. In this way, the Court has unduly focused on federalism as a limit on federal power and ignored protecting federal interests as a crucial aspect of federalism.

A second implication of including supremacy of federal law as a key component of federalism is the importance of federal courts being available to enforce rights against state governments. In a startling paper at this symposium, Professor Nelson Lund argues against enforcement of the Bill of Rights against state governments.[59] For much of this century, there was a raging debate over which parts of the Bill of Rights apply to state and local governments. On the one side, there were the total incorporationists who believed that all of the Bill of Rights should be deemed to be included in the due process clause of the Fourteenth Amendment. Justices Black and Douglas were the foremost advocates of this position.[60]

On the other side, there were the selective incorporationists who believed that only some of the Bill of Rights were sufficiently fundamental to apply to state and local governments. Justice Cardozo, for example, wrote that "the process of absorption . . . [applied to rights where] neither liberty nor justice would exist if they were sacrificed."[61] Justice Cardozo

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57. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 27 (1913).

58. *See, e.g.*, Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991).

59. Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045 (1997).

60. *See, e.g.*, Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

61. Palko v. Connecticut, 302 U.S. 319, 326 (1937).

said that the Due Process Clause included "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"[62] and that were therefore implicit "in the concept of ordered liberty."[63]

But after decades of debate, it seems clearly settled that the Bill of Rights, except for a few provisions that never have been incorporated, apply to state and local governments. Indeed, the average citizen undoubtedly would be surprised to know that there ever was a time that the First Amendment's protection of freedom of speech or the Fourth Amendment's prohibition of unreasonable searches and seizures did not apply to state governments. Yet, now Professor Lund asks us to reexamine this basic aspect of modern constitutional law.

Undoubtedly he is correct that one aspect of federalism would be served without federal court enforcement of the Bill of Rights: states would have fewer constraints on their laws and governance. But what is omitted is the other, and more important, component of federalism: ensuring the supremacy of the Constitution of the United States. Professor Lund's approach would leave the enforcement of the Bill of Rights entirely to the state courts, unchecked even by Supreme Court review. In other words, the antimajoritarian protections of the United States Constitution would be left entirely to the majoritarian processes of state governments. Justice Robert Jackson perhaps expressed this best when he wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[64]

Without federal courts to enforce the Bill of Rights, the most basic liberties would be enforced only through state courts. In virtually every state, judges are electorally accountable through some form of review at the polls. Without even the possibility of Supreme Court review, nothing would prevent a state from simply ignoring the commands of the Constitution. Indeed, although Professor Lund presents his proposal as advancing federalism, it would undermine that very constitutional value because it would make state law supreme over federal. The Supreme Court would continue to interpret the Bill of Rights provisions in cases involving federal law. States, however, could disregard with impunity

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62. *Id.* at 325 (quoting Snyder v. Mass., 291 U.S. 97, 105 (1933)).

63. *Id.*

64. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

these Supreme Court rulings. The result would be that states would have the last word as to the meaning of the United States Constitution.

In fact, Professor Lund's proposal only could result in less protection of constitutional liberties. States already are free, through their legislatures and courts, to provide greater protection than under the United States Constitution. The sole effect of Professor Lund's approach would be to allow states to disregard Supreme Court decisions interpreting the provisions of the Bill of Rights.

Professor Lund defends his proposal by attacking the ability of the Supreme Court to make the delicate balance of liberty and order.[65] The question, however, is what institution is better suited to making judgments as to the meaning of the Constitution. The very purpose of the Constitution—protecting fundamental values from majority rule—indicates why its meaning should not be left to the political process. As I have argued at length elsewhere,

> it is desirable for society to have an institution, such as the judiciary, that is accorded great discretion in imparting specific, modern content to constitutional provisions. The Supreme Court's role in interpreting the general language of the Constitution is to identify those values so important that they should be protected from majority rule.[66]

From this perspective, the Supreme Court is the ideal institution to make the difficult balancing judgments that the Constitution requires precisely because it is charged with interpreting that document without regard to the wishes of the majority. Ultimately, the point again is that federalism must include consideration of protecting the federal government's interests and this is omitted from Professor Lund's analysis.

A third and final implication from focusing on supremacy as a key component of federalism is that Congress should have broad discretion to choose the best means for implementing its laws. A key flaw in the Supreme Court's Tenth Amendment decisions, both before 1937 and in the 1990s, is that they have lost sight of this.

For example, before 1937, *Hammer v. Dagenhart*,[67] known as The Child Labor Case, was the most significant case to construe the Tenth Amendment in this way. A federal law prohibited the shipment in interstate commerce of goods produced in factories employing children under age fourteen or employing children between the ages of fourteen and sixteen for more than eight hours per day or six days a week. Although the law was limited to regulating goods in interstate commerce, the Court declared it unconstitutional because it controlled production.

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65. Lund, *supra* note 59.
66. ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 129 (1987).
67. 247 U.S. 251 (1918).

The Court declared that "[t]he grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."[68] The Court said that regulating the hours of labor of children was entrusted "purely [to] state authority."[69]

But the Court here ignored that the protection of state autonomy was illusory because the national market restricted the ability of the states to choose whether to allow or prohibit child labor. If a few states allowed child labor, goods produced there would be less expensive than those made in states that prohibited child labor. The market would favor the goods that were cheaper by virtue of their production by inexpensive child labor. Over time, the pressure would be enormous for all states to allow child labor. The Court flatly rejected this as a sufficient basis for federal legislation. In fact, the Court said:

> The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government practically destroyed.[70]

This hyperbole has not proven true. Congress has regulated child labor over the past sixty years and all commerce has not been at any end, the power of states has not been eliminated, and our system of government has not been destroyed. Indeed, it was the earlier ruling that compromised federalism by denying Congress the necessary means to implement its law prohibiting the shipment of goods made by child labor.

In the 1990s, the Court used the Tenth Amendment in *New York v. United States*[71] to invalidate the federal Low-Level Radioactive Waste Disposal Act. A federal law, the 1985 Low-Level Radioactive Waste Policy Amendments Act of 1985, created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders.[72] The Act provided monetary incentives for states to comply with the law and allowed states to impose a surcharge on radioactive wastes received from other states.[73] Additionally, and most controversially, to ensure effective state government action, the law provided that

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68. *Id.* at 273-74.
69. *Id.* at 276.
70. *Id.*
71. 505 U.S. 144 (1992).
72. *See id.* at 150-51 (discussing Pub. L. No. 99-240, 99 Stat. 1842 (codified as amended at 42 U.S.C. § 2021(b) (1994))).
73. *See id.* at 152-53.

states would "take title" to any wastes within their borders that were not properly disposed of by January 1, 1996 and then would "be liable for all damages directly or indirectly incurred."[74]

The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive wastes. However, by a 6-3 margin, the Court held that the "take title" provision of the law was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress."[75] Justice O'Connor, writing for the Court, said that it was impermissible for Congress to impose either option on the states. Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation. The Court concluded that it was "clear" that because of the Tenth Amendment and limits on the scope of Congress's powers under Article I, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[76] The Court explained that allowing Congress to commandeer state governments would undermine government accountability because Congress could make a decision, but the states would take the political heat and be held responsible for a decision that was not theirs.

However, in appraising *New York v. United States*, it is important to remember that the Court began by noting that Congress had the power to deal with the serious problem of nuclear wastes. Thus, I believe that Congress also should have the means of choosing the best mechanism as a way of implementing federal law. Because sites for disposal vary in differing parts of the country, it made sense to not require a uniform system of disposal, but to allow states to choose what was best in this area. This is exactly what the federal law did.

Moreover, Justice O'Connor's key argument for invalidating the law—the need to ensure political accountability—is based on highly questionable assumptions.[77] Justice O'Connor presumes that if Congress forces the states to do something, voters will not hold Congress responsible but will blame the conduct on the primary actor, state governments. Voters, however, can surely understand that the state is acting because it is required to by federal law. Every person does many things that he or she otherwise would not because of federal mandates. Paying taxes is a simple example. Why then can people not understand that a state

74. *Id.* at 153-54 (discussing 42 U.S.C. § 2021(d)(2)(C)).
75. *Id.* at 175.
76. *Id.* at 188.
77. I make this point in Chemerinsky, *supra* note 9, at 517.

government, too, might have to do something because of a federal mandate? State government officials, of course, can explain to the voters that the federal government required the particular actions.

Again, my central point is that once Congress has the power to legislate, a law should not be declared unconstitutional on the ground that it violates state sovereignty or the Tenth Amendment. As *M'Culloch v. Maryland*[78] stated long ago: Congress should have broad discretion to choose the means to carry out its lawful objectives.[79]

IV. FEDERALISM AS A MEANS TO MORE EFFECTIVE GOVERNMENT

The structure of government, of course, is not an end in itself, but rather, it is a means to an end. The ultimate objective is effective government, but with minimal risks of tyrannical rule. The key question about federalism, therefore, needs to be about how having multiple levels of government—federal, state, and local—might contribute to having an effective government without risks of abusive power.

Traditionally, discussions of federalism have focused exclusively on the latter and have seen federalism as a way of checking tyrannical power.[80] I believe that this approach has ignored the ways in which federalism can contribute to effective governance and, in fact, has greatly overstated the ability of federalism to prevent tyrannical rule.

How can federalism be used to advance more effective government? A key advantage of having multiple levels of government is the availability of alternative actors to solve important problems. If the federal government fails to act, state and local government action is still possible. If states fail to deal with an issue, federal or local action is possible. In other words, a tremendous advantage of federalism is its redundancy—multiple levels of government over the same territory and population, each with the ability to act.[81] From this perspective, federalism needs to be reconceptualized as being primarily about empowering varying levels of government and much less about limiting government.

Sometimes effective government requires concerted effort at all three levels, federal, state, and local. Environmental protection is an example of this, where federal laws have been essential, but where local conditions and problems have necessitated independent state and local action.

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78. 17 U.S. (4 Wheat.) 316 (1819).

79. *See id.* at 427.

80. *See, e.g.*, DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91-137 (1995) (discussing federalism as a constraint on power that enhances liberty).

81. The benefits of redundancy in the judicial context are discussed in Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045-68 (1977).

Sometimes, though, one level of government must act because of the failure at other levels. During the 1950s and the 1960s, it was obvious that southern states would not act to end segregation and systematic discrimination against African-Americans. The Supreme Court's decisions and laws such as the 1964 Civil Rights Act[82] and the Voting Rights Act of 1965[83] were essential federal actions. In the 1990s, as the federal government has abandoned the war on poverty and the poor, it is imperative that state and local governments act to ensure that people have food, shelter, and medical care.

Although this view of federalism should be apparent from the very structure of American government, it is virtually absent from the Supreme Court's federalism decisions. The closest the Supreme Court comes to this is the claim that states can serve as laboratories for experimentation. Justice Brandeis apparently first articulated this idea when he declared:

> To say experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[84]

More recent Supreme Court rulings also have invoked this notion. Justice Powell, dissenting in *Garcia v. San Antonio Metropolitan Transit Authority*,[85] lamented that "the Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as 'laboratories.'"[86] Likewise, Justice O'Connor, dissenting in *Federal Energy Regulatory Commission v. Mississippi*,[87] stated that the "Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas."[88]

The question is what conclusion to draw from this notion that states can be laboratories. At the very least, it should be relevant only in areas where state experimentation is desirable. For instance, in *United States*

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82. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000e (1994)).

83. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 (1994)).

84. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

85. 469 U.S. 528, 557-79 (1985) (Powell, J., dissenting).

86. *Id.* at 567-68 n.13 (Powell, J., dissenting).

87. 456 U.S. 742, 775-97 (1982) (O'Connor, J., dissenting).

88. *Id.* at 787-88 (O'Connor, J., dissenting).

v. Lopez,[89] it seems unthinkable that it would be useful to allow states to experiment with having guns near schools.

Also, there is the basic question of who should decide when further experimentation is warranted or when there is enough knowledge to justify one approach. There is the constant issue of whether a particular matter justifies uniform federal action or whether it would be preferable to allow geographic diversity and the experimentation that allows. From this perspective, the need for using states as laboratories is a policy argument to be made to Congress against federal legislation and not a judicial argument that should be used to invalidate particular federal laws on the grounds that they unduly limit experimentation. Additionally, Congress and even federal agencies can design experiments and try differing approaches in varying parts of the country.[90]

In other words, viewing states as laboratories is completely consistent with seeing federalism as being about empowerment.[91] But it should not be a basis for invalidating federal laws. In fact, seeing federalism from the perspective of empowerment explains why the use of federalism as a basis for limiting federal power is misguided. The federal government, too, must be empowered to deal with problems, so long as the action fits within the broadly construed scope of Congress's Article I authority.

As an example, in *Hammer v. Dagenhart*,[92] the child labor case described earlier,[93] the Court's error was in using federalism to stop Congress from dealing with the problem of child labor by banning shipments in interstate commerce of goods made by children.[94] There certainly was no reason to allow states to experiment with exploiting children or to question Congress's judgment that national uniformity was desirable in this area.[95]

Similarly, in *New York v. United States*,[96] the federal law was very much about empowering states and from this perspective should have been upheld. Congress allowed each state to choose for itself the best way of cleaning up its low-level nuclear wastes.[97] Congress had the

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89. 115 S. Ct. 1624, 1630-34 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's Commerce Clause authority).

90. Professors Rubin and Feeley argue that the political realities are that state and local governments will undertake relatively few experiments and "that most significant 'experimental' programs in recent years have in fact been organized and financed by the national government." Rubin & Feeley, *supra* note 10, at 925.

91. Professor Merritt develops this point in Merritt, *supra* note 8, at 500-552.

92. 247 U.S. 251 (1918).

93. *See supra* text accompanying notes 67-70.

94. *See* 247 U.S. at 276-77.

95. *See id.* at 275.

96. 505 U.S. 144 (1992).

97. *See id.* at 152-54.

constitutional authority to deal with the serious social problem of nuclear wastes.[98] Federal action was needed because state and local governments had not adequately dealt with the problem.[99] Rather than mandate a uniform national approach, Congress left it to each state to decide for itself how best to deal with the contaminated debris.[100] The alternative, which the Court indicated that it would have approved, is that Congress could have mandated how nuclear wastes were to be cleaned up.[101] But for Congress to impose uniform standards on states would have left states less discretion and power to deal with the problem in an appropriate manner. In other words, the approach that the Court implicitly endorsed would have limited state authority, while the law the Court disapproved empowered states to choose the techniques of clean up that they thought best. The Court thus erred in *New York v. United States* in invalidating the federal law. From the perspective of empowering government at all levels, the federal law was an excellent approach.

There are other important implications from viewing federalism as being primarily about empowerment. Doctrines of federal jurisdiction that limit the power of federal courts based on a need to defer to state judiciaries should be reexamined. As I have argued at length elsewhere, jurisdictional doctrines should be reconceived to maximize the availability of *both* federal and state courts to hear federal law claims.[102] Litigants with constitutional claims should have the ability to choose the forum in which to proceed. The litigant-choice principle, which I have described and argued for in an earlier article,[103] allows a party with a constitutional claim to choose between state and federal court and thus to select the forum likely to provide the most sympathetic hearing. The litigant and his or her attorney are in the optimal position to assess which court in that geographic area offers a better chance of vindicating a particular federal law claim.

Jurisdictional doctrines should empower both levels of courts to hear federal law issues. No longer should federalism be a basis for restricting federal court power to hear federal claims. Quite the contrary, federalism should be seen as grounds for ensuring the availability of a federal forum to decide federal law, especially questions of constitutional law.

A final implication of viewing federalism as being about empowerment and not limits concerns the preemption doctrine. A key way in which

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98. *See id.* at 149.

99. *See id.* at 150-51.

100. *See id.* at 152-54.

101. *See id.* at 166-69.

102. *See generally* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988).

103. *See id.*

federalism limits government is through preemption of state and local governments. Although my primary focus in this Paper has been on challenging the view of federalism as a limit on federal power, there also must be consideration of the ways in which federalism is a constraint on state and local governments.[104]

A broad view of preemption leaves less room for governance by state and local governments. It is for this reason that, at times, the Court has declared that the preemption analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."[105]

Viewing federalism as being about empowerment suggests that this language from the Supreme Court should be taken very seriously. It does not, of course, mean that federal law never will be found to preempt state and local law. The Supremacy Clause in Article VI requires that state law be invalidated when it conflicts with federal dictates.[106] Rather, seeing federalism as being about empowerment means that preemption doctrine should be narrowed and applied only when there is express preemption or very clear Congressional intent to preempt.

Thus, looking at federalism as empowerment has important implications in terms of Congress's power, the federal judicial power, and preemption. The goal is to maximize the likelihood that some government will act to deal with the enormous problems facing society. In this way, federalism is used to achieve the underlying goal of the Constitution: effective governance.

The proper response to this is to point out that the goal of the Constitution is effective government while minimizing the possibility of tyrannical rule. Critics of my position might contend that I have emphasized the former and ignored the ways in which federalism helps to prevent abusive government. Critics might claim that the possibility of federal abuses could be limited by restricting the authority of the federal government.

Dividing power vertically among levels of government can be seen as a way of checking authority and decreasing the possibility of tyranny. Also, the danger of tyranny at the federal level is much more ominous than autocratic rule at the state or local level.

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104. For excellent recent discussions of preemption, see Catherine Fisk, *The Last Article About the Language of ERISA Preemption?: A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 37 (1996); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829 (1992).

105. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

106. *See* U.S. CONST. art. VI, cl. 2.

There are several responses to this. First, the best check against tyranny is judicial review safeguarding individual liberties. "Tyranny" is both a loaded and an ambiguous word. In a world where we witness truly tyrannical and abusive rule, the mere invocation of the concept has enormous rhetorical power. But it is essential to consider what really constitutes tyranny. The examples that come to mind can be best dealt with by ensuring the availability of courts to invalidate unconstitutional government conduct.

Second, empowering multiple levels of government is itself a safeguard against tyranny. Generally, each level of government has the ability to expand individual rights. States can provide more rights and greater protection of equality than the federal government, but never less. In fact, maximizing the availability of federal courts to protect federal rights seems an important step to ensuring an effective check against violations of liberties and abuses of power.

Finally, it must be noted that the Supreme Court's decisions about federalism have had nothing to do with preventing tyranny. Forcing states to clean up their nuclear wastes or prohibiting guns near schools are desirable government actions; they are not in any way tyrannical. If the ultimate concern behind federalism is preventing tyranny, then the Supreme Court should focus on this value directly and invalidate laws only where there is a real risk of abuse of power.

V. CONCLUSION

As America enters the twenty-first century, it confronts enormous social problems. One out of four children lives below the poverty level. Recent welfare reforms create real concern over whether many of them will have adequate food or access to medical care. The educational system in many cities is grossly inadequate and separate and unequal in every way. More affluent whites attend high quality suburban or private schools, while poor African-American and Latino children attend largely segregated and underfunded inner-city public schools. Major environmental problems remain.

Thus, my concern is not that there will be too much government action, but too little. Government must be empowered to deal with these difficult and entrenched social problems. Federalism can make a major contribution to this effort if it is reconceptualized as a way of empowering all three levels of government to act. The focus which has dominated this century—seeing federalism as being about limits—needs to be abandoned and replaced with one that will maximize the likelihood of effective government.

Yet, the notion of radically limited federal powers seems anachronistic in the face of a modern national market economy and decades of

extensive federal regulations. Additionally, there has been a major shift over time as to how abusive government is best controlled. Now it is thought that if a federal action intrudes upon individual liberties the federal judiciary will invalidate it as unconstitutional. Judicial review is seen as an important check against tyrannical government actions.

Throughout American history, federalism has been invoked by conservatives as a way of trying to limit federal power to prevent changes that they opposed. Whether it was southerners in the early nineteenth century using federalism as the grounds for opposition to the abolition of slavery, or the opposition to federal labor legislation in the early twentieth century, or the resistance to the civil rights advances of the 1950s and 1960s, federalism always was invoked as a procedural way of trying to block progressive changes. This use of federalism unfortunately has set the agenda throughout American history. Now, though, it is time to change how federalism is seen and used. It should not be about limiting the power of government, but enhancing it. Most of all, federalism should not be a constraint on federal action to solve social problems, but an explanation for why the federal government must act when other levels of government fail to deal with key social problems. Federalism should be a key tool for solving the ills that confront America as it enters the twenty-first century.